

DISSENTING OPINION BY NAKAYAMA, J.

I respectfully dissent. The majority holds that the ICA gravely erred because its opinion "regarding the issue of attorney's fees and costs was not ripe for decision and constitutes an advisory opinion akin to the issuance of an opinion where there is no subject matter jurisdiction." Majority opinion at 27-28. However, with all due respect, the majority overlooks that this court has also issued advisory opinions in the past. See, e.g., E & J Lounge Operating Co., Inc. v. Liquor Comm'n of City & County of Honolulu, 118 Hawai'i 320, 350, 189 P.3d 432, 462 (2008) (providing guidance to the Liquor Commission of the City & County of Honolulu on remand with regard to the proper interpretation of Hawai'i Revised Statutes (HRS) §§ 91-11, 281-59(a), and 91-13.5); State v. Nichols, 111 Hawai'i 327, 340, 141 P.3d 974, 987 (2006) ("Because we vacate the judgment below and remand for a new trial due to the plain error discussed in Section III.A, we need not consider Nichols' remaining points of error. We nevertheless address them in order to provide guidance to the circuit court on remand."); Courbat v. Dahana Ranch, Inc., 111 Hawai'i 254, 263-64, 141 P.3d 427, 436-37 (2006) (holding that the circuit court erred in granting summary judgment, but providing guidance on remand to the trier of fact that, among other things, "it was error for the circuit court in the present matter to apply" a certain statute); KNG Corp. v. Kim, 107 Hawai'i 73, 80, 110 P.3d 397, 404 (2005) ("provid[ing] guidance to the court on remand," this court "address[ed] Defendant's argument" regarding the constitutionality of a statute); Gap v. Puna Geothermal Venture, 106 Hawai'i 325, 341-43, 104 P.3d 912,

928-30 (2004) (offering guidance to the circuit court on remand with regard to setting the appropriate sanction); In re Water Use Permit Applications, 105 Hawai'i 1, 12, 93 P.3d 643, 654 (2004) (remanding the proceedings to the Commission on Water Resource Management for further findings and opining that, "[i]f, on remand, the Water Commission is able to support its conclusion with findings quantifying the windward streams' flows during the 1960s, then the 1960s testimonials would be sufficient to set the [interim instream flow standard] at the levels established in the [Water Commission's decision & order]" for several reasons); Ditto v. McCurdy, 102 Hawai'i 518, 523, 78 P.3d 331, 336 (2003) (providing guidance to the circuit court and parties regarding writs of execution); State v. Wakisaka, 102 Hawai'i 504, 518, 78 P.3d 317, 331 (2003) ("Although the previous two issues are dispositive of this case, we address the court's exclusion of much of Dr. Lawler's proffered testimony in order to provide some guidance on retrial."); State v. Culkin, 97 Hawai'i 206, 211, 35 P.3d 233, 238 (2001) (providing guidance to the circuit court on remand regarding certain evidentiary rulings); State v. Mahoe, 89 Hawai'i 284, 285, 972 P.2d 287, 288 (1998) (holding that Mahoe's constitutional rights were violated, but electing to "address Mahoe's third point of error" regarding a jury instruction "because it raises a novel issue that has the potential to recur in future cases"); State v. Kauhi, 86 Hawai'i 195, 200, 948 P.2d 1036, 1041 (1997) (vacating Kauhi's convictions and remanding to the circuit court for a new trial, but "address[ing] the remaining issues on appeal," which involved evidentiary and

constitutional issues, "inasmuch as they will undoubtedly resurface on remand"). By holding that the Intermediate Court of Appeals ("ICA") gravely erred because a portion of its opinion was advisory, the majority's holding appears to implicate the precedential significance of certain past decisions of this court.

Moreover, the ICA has, in the past, likewise issued opinions similar to the advisory opinions issued by this court. See, e.g., Moran v. Guerreiro, 97 Hawai'i 354, 374, 37 P.3d 603, 623 (App. 2001) ("Because of our vacatur of the order dismissing Moran's complaint with prejudice, we address, for the circuit court's guidance on remand, a legal issue that generated considerable confusion during the proceedings below -- the validity of the May 7, 1992 deed which Sharpe signed, conveying her 1/18 interest in Parcel 3 to Moran."); State v. Hoang, 94 Hawai'i 271, 281, 12 P.3d 371, 381 (App.) (providing guidance on remand regarding the defendant's right to allocution), cert. denied, 94 Hawai'i 329, 13 P.3d 854 (2000); State v. Corella, 79 Hawai'i 255, 261, 900 P.2d 1322, 1328 (App. 1995) (providing guidance on remand regarding certain evidentiary issues); Topliss v. Planning Comm'n, 9 Haw. App. 377, 394, 842 P.2d 648, 658 (1993) (providing guidance to the Planning Commission of the County of Hawai'i on remand regarding its options upon reconsideration of the plaintiff's petition for a special management area permit). In this regard, the majority does not explain why we may issue advisory opinions and the ICA, pursuant to the majority's holding, cannot.

Indeed, the majority concludes that, because the attorney's fees and costs issue is unripe, there is a lack of subject matter jurisdiction for the ICA to consider this issue at this time. Majority opinion at 27-28. However, if, according to the majority, the ICA lacked jurisdiction because the attorney's fees and costs issue is unripe, then it logically follows that we too lacked jurisdiction to issue the advisory opinions that we did. See State v. Moniz, 69 Haw. 370, 373, 742 P.2d 373, 376 (1987) ("[A]ppellate courts are under an obligation to insure that they have jurisdiction to hear and determine each case."). Therefore, the majority's opinion brings into question the enforceability of some of our past judgments, some of which are cited above. See id.

Nonetheless, the majority contends that the ICA, by "provid[ing] guidance to the [Labor and Industrial Relations Appeals Board ("LIRAB")], . . . raises serious concerns regarding separation of powers, judicial interference, and premature adjudication." Majority opinion at 20. However, with all due respect, the majority overlooks that the plain language of HRS § 386-93(b) applies not only to attorney's fees and costs incurred in connection with proceedings before the LIRAB, but also to those fees and costs incurred in proceedings before "the supreme court of the State[.]" In this regard, similar to the reasoning expressed by the ICA in this case, see Kapuwai v. City & County of Honolulu, 119 Hawai'i 304, 313, 196 P.3d 306, 315 (App. 2008), any determination of whether an "employer" is the "lose[r]" on appeal to "the supreme court of the State" must be based on the

final decision of the "supreme court." See Lindinha v. Hilo Coast Processing Co., 104 Hawai'i 164, 171-72, 86 P.3d 973, 980-81 (2004) ("[T]he plain language of [HRS § 386-93(b)] . . . does not qualify that stage in the appellate process at which the employer must lose in order to incur liability for attorney's fees and costs Thus the text [of HRS § 386-93(b)] contemplates an appeal that is ultimately decided in this court." (Brackets and ellipses added.)). Furthermore, this court has said that HRS § 386-93(b)

plainly authorizes assessment of attorney's fees and costs against the employer if it loses, whether the case ends in the LIRAB or this court.[] The gravamen of the statute is that attorney's fees and costs are awarded to the employee if the employer ultimately loses its appeal, irrespective of where the appeal was first brought. As such, we read the statute as assessing fees and costs against an employer if the employer loses the final appeal.

Id. (emphases added) (footnote omitted).¹ By its plain language, then, an assessment of whether "the employer loses the final appeal" applies to those appeals not only before the LIRAB, but also before an appellate court. See id.

In that connection, in my view it is difficult to discern how the ICA has, as stated by the majority, "implicat[ed] separation-of-powers concerns," majority opinion at 27, when the plain language of HRS § 386-93(b) applies to the judicial branch of the government in the same manner as the executive branch. Indeed, the cases that the majority relies on illustrate well the distinction between the attorney's fees and costs issue in this

¹ In a footnote, this court noted that, "[o]f course, an appeal to the supreme court may be assigned to the ICA." Lindinha, 104 Hawai'i at 171 n.12, 86 P.3d at 980 n.12 (brackets added).

case and those areas committed to other branches of the government.

For example, in Save Sunset Beach Coalition v. City & County of Honolulu, 102 Hawai'i 465, 482, 78 P.3d 1, 18 (2003), the plaintiffs asserted, *inter alia*, that a permitted use of land under the City's county district exceeded the state agricultural district because it allowed for the use of a "dwelling, detached, one-family," and required no special permit for such use. This court ultimately affirmed the circuit court's grant of summary judgment on ripeness grounds because the owner of the land in question claimed that it would comply with HRS chapter 205, and the City represented that it would enforce the appropriate statutes and zoning ordinances and allow only the most restrictive use of the land in the event of a conflict. *Id.*; *see id.* at 481, 78 P.3d at 17 ("[A]ny conflict between the State provisions and the county zoning ordinances is resolved in favor of the State statutes, by virtue of the supremacy provisions in article VIII, section 6 of the Hawai'i Constitution[] and HRS § 50-15.[]" (Footnotes omitted and brackets added.)).

Significantly, however, this court expressly "conclude[d] that a zoning ordinance is a legislative act and is subject to the deference given legislative acts" because such an ordinance "predetermine[s] what the law shall be for the regulation of future cases falling under its provisions[,] . . . rather than merely 'execut[ing] or administer[ing] a law already in existence[.]'" *Id.* at 474, 78 P.3d at 10 (quoting Life of the Land, Inc. v. City Council, 61 Haw. 390, 423-24, 606 P.2d 866,

887 (1980)) (brackets added and in original, ellipsis added, some internal quotation marks omitted); see id. at 480, 78 P.3d at 16 ("The counties of our state derive their zoning powers from HRS § 46-4(a) (Supp. 1998), referred to as the Zoning Enabling Act." (Internal quotation marks and citation omitted.)). Accordingly, we observed that "[p]rudent rules of judicial self-governance founded in concern about the proper -- and properly limited -- role of courts in a democratic society, considerations flowing from our coequal and coexistent system of government, dictate that we accord those charged with drafting and administering our laws a reasonable opportunity to craft and enforce them in a manner that produces a lawful result." Id. at 483, 78 P.3d at 19 (emphasis added) (brackets in original) (internal quotation marks and citation omitted).

The ripeness issue in Bremner v. City & County of Honolulu, 96 Hawai'i 134, 28 P.3d 350 (App. 2001) is very similar to that of Save Sunset Beach Coalition. Therein, the ICA declined to address the plaintiff's challenge to a zoning ordinance because, according to the ICA, "until there is actual implementation of the zoning ordinance in the form of a specific development project proposed or approved under the ordinance," the plaintiff's assertions were not ripe for adjudication. Id. at 143-44, 28 P.3d at 359-60. The ICA's holding was based on its "concern about infringing upon the authority of our elected brethren[,] " which "becomes particularly acute whenever a challenge to legislation predates efforts to implement its provisions." Id. In other words, in light of Save Sunset Beach

Coalition, the ICA essentially held that the zoning ordinance in question "predetermine[d] what the law shall be for the regulation of future cases falling under its provisions[,]" and, as a result, the plaintiff's assertions were not ripe for adjudication until actual implementation thereof. See 102 Hawai'i at 474, 78 P.3d at 10 (brackets added and in original) (internal quotation marks and citation omitted).

In State v. Fields, the circuit court attached certain conditions to the defendant's probation, one of which, the defendant asserted, infringed on her constitutional right to be free from unreasonable searches and seizures. 67 Haw. 268, 273, 686 P.2d 1379, 1385 (1984). The defendant's request for judicial review of the condition came "before any effort of the government to exploit the particular condition of probation." Id. Accordingly, the prosecution asserted that "the self-imposed rules governing the exercise of [this court's] statutory jurisdiction militate against a present review of the circuit court's order." Id. However, notwithstanding the prosecution's ripeness argument, this court addressed the defendant's assertion by focusing on the "propriety" of the condition itself, rather than the "discretion vested in the sentencing court" by the legislature "to saddle a probationer with any condition 'reasonably related to [his] rehabilitation . . . and not unduly restrictive of his liberty or incompatible with his freedom or conscience.'" See id. at 276-77, 686 P.2d at 1386-87 (citation omitted) (brackets and ellipsis in original).

Significantly, this court's discussion of the ripeness

issue in Fields did not involve any other branch of the government except the legislature. See id. As such, this court's ripeness discussion in State v. Maugaotega, 115 Hawai'i 432, 168 P.3d 562 (2007) ("Maugaotega II") contrasts well with Fields.

In Maugaotega II, this court "declined to assert its inherent authority to empanel a jury on remand because, as a rule, prudential rules of judicial self-governance properly limit the role of the courts in a democratic society[,] and "[o]ne such rule is that, 'even in the absence of constitutional restrictions, courts must still carefully weigh the wisdom, efficacy, and timeliness of an exercise of their power before acting, especially where there may be an intrusion into areas committed to other branches of government.'" Id. at 450, 168 P.3d at 580 (block format, brackets, emphasis, and citations omitted). In other words,

in Act 230, the legislature expressed its intent regarding how best to conform our extended term sentencing regime to the requirements of Apprendi v. New Jersey, 530 U.S. 466 (2000)] and its progeny and, in so doing, did not vest in the jury the power to find the requisite aggravating facts but, rather, directed that the sentencing court should retain that responsibility.

Id. at 449, 168 P.3d at 579 (referring to 2006 Haw. Sess. L. Act 230, §§ 23 and 24 at 1012-13) (emphases added). In Maugaotega II, the area committed to another branch of government that this court was concerned with encroaching upon was the lawmaking function of the legislature: "[T]he [c]ourt's function in the application and interpretation of . . . laws must be carefully limited to avoid encroaching on the power of [the legislature] to

determine policies and make laws to carry them out." Id. at 450, 168 P.3d at 580 (quoting Ross v. Stouffer Hotel Co., 76 Hawai'i 454, 467, 879 P.2d 1037, 1050 (1994) (Klein, J., concurring and dissenting)) (internal quotation marks omitted) (brackets and ellipsis in original). Thus, instead of "intru[ding] into areas committed to" the legislative branch of government, this court decided to exercise "self-restraint" by declining to assert our inherent authority to empanel a jury on remand. See id. at 449-51, 168 P.3d at 578-81.

As mentioned above, all three cases that the majority relies on illustrate well the distinction between the attorney's fees and costs issue in this case and those areas committed to other branches of the government. More specifically, unlike Save Sunset Beach Coalition and Bremner, the LIRAB in this case would be "merely 'execut[ing] or administer[ing] a law already in existence[]'" -- namely, HRS § 386-93(b) -- rather than a "legislative act" of the LIRAB that "predetermine[s] what the law shall be for the regulation of future cases falling under [the legislative act's] provisions." See Save Sunset Beach Coalition, 102 Hawai'i at 474, 78 P.3d at 10 (internal quotation marks and citation omitted, brackets added); Bremner, 96 Hawai'i at 143-44, 28 P.3d at 359-60. Moreover, instead of "intru[ding] into areas committed to other branches of government[,]" see Maugaotega II, 115 Hawai'i at 450, 168 P.3d at 580 (brackets added, emphasis omitted), the ICA, by providing guidance to the LIRAB, was merely interpreting the language of HRS § 386-93(b). See id.; see also Fields, 67 Haw. at 276-81, 686 P.2d at 1386-89 (interpreting the

Fields, 67 Haw. at 276-81, 686 P.2d at 1386-89 (interpreting the language of the relevant statutory provision in effect at that time that "vested" the sentencing court with "discretion" "to saddle a probationer with any condition 'reasonably related to [his] rehabilitation . . . and not unduly restrictive of his liberty or incompatible with his freedom or conscience'").

Additionally, it is well established that, if possible, statutes will be construed in such a manner so as to avoid conflicting interpretations of the same statute. See Colony Surf, Ltd. v. Dir. of Dep't of Planning & Permitting, 116 Hawai'i 510, 516, 174 P.3d 349, 355 (2007) ("[T]he legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction, and illogicality." (Citation and internal quotation marks omitted.)). Inasmuch as the plain language of HRS § 386-93(b) applies to the executive branch of the government in the same manner as the judicial branch, and the LIRAB in this case would be "merely 'execut[ing] or administer[ing] a law already in existence[,]'"² see Save Sunset Beach Coalition, 102 Hawai'i at 474, 78 P.3d at 10, the language of the statute should be interpreted consistently amongst the branches.² See Colony Surf, 116 Hawai'i at 543, 174 P.3d at 355. Therefore, in my view it cannot be said, as the majority contends, that an award of attorney's fees and costs pursuant to HRS § 386-93(b) constitutes

² In this regard, I believe that my reliance on the afore-cited cases of this court that have provided guidance on remand by interpreting the language of various statutes and rules to be quite relevant here, notwithstanding the concurring opinion's novel approach at distinguishing each of them from the instant case. See Concurring opinion at 1-26.

branches of the government." Majority opinion at 21. Accordingly, inasmuch as I believe that the majority misuses this court's separation of powers jurisprudence, the majority's conclusion that the ICA lacked jurisdiction to issue an advisory opinion in this case logically leads to the same conclusion that we too lacked jurisdiction to issue the advisory opinions that we did. See Moniz, 69 Haw. at 373, 742 P.2d at 376.

Finally, in light of this court's prior cases that have provided guidance on remand, I believe that the ICA had jurisdiction to consider this statutory interpretation issue. As such, I point out that Hawai'i Rules of Appellate Procedure (HRAP) Rule 40.1(d)(1) and (4) (2009) provides:

The application for a writ of certiorari . . . shall contain, in the following order:

(1) A short and concise statement of the questions presented for decision, set forth in the most general terms possible. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Questions not presented according to this paragraph will be disregarded. The supreme court, at its option, may notice a plain error not presented.

(4) A brief argument with supporting authorities.

In its application for writ of certiorari, the Petition/Employer-Appellee City and County of Honolulu, Department of Parks and Recreation ("the City") asserted, inter alia, that the ICA gravely erred "when it concluded an employer is regarded as the loser on appeal if it fails to obtain a substantial reduction of the compensation award." The City based its assertion on the plain language of HRS § 386-93(b) (1993), pertinent case law, and the standard of appellate review applicable to mixed questions of law and fact. As recognized by

the majority, see majority opinion at 17, nowhere within its application does the City assert that the ICA gravely erred because it issued an advisory opinion in its interpretation of HRS § 386-93(b). Additionally, nowhere within its statement in opposition to the City's application for writ of certiorari does Respondent/Claimant-Appellant Darrell N. Kapuwai ("Kapuwai") assert that the attorney's fees and costs issue was ripe for decision by the ICA, and neither party has presented the separation of powers argument relied upon by the majority.

This court has consistently declined to address an issue either not raised as a point of error or not argued. See, e.g., Jou v. Dai-Tokyo Royal State Ins. Co., 116 Hawai'i 159, 171, 172 P.2d 471, 483 (2007) (deeming certain points of error waived pursuant to HRAP Rule 28(b)(7) because they were not argued, and disregarding certain arguments pursuant to HRAP Rule 28(b)(4) because they were not raised as points of error). Notwithstanding the requirements of HRAP Rule 28(b)(4), this court has, under certain circumstances, "adhered to the policy of affording litigants the opportunity to have their cases heard on the merits, where possible." Morgan v. Planning Department, County of Kauai, 104 Hawai'i 173, 180, 86 P.3d 982, 989 (2004) (citation and internal quotation marks omitted). However, adherence to the above policy requires that the party actually raise the issue before an appellate court. See id. ("Because the issues raised by the Planning Department and Planning Commission

are of great importance to this community, we address the merits of the issues raised, notwithstanding a technical violation of [HRAP Rule 28(b)(4)]."). Again, nowhere does the City assert that the ICA gravely erred because the attorney's fees and costs issue was not ripe for decision.

By preempting the adversarial process in its review of the ICA's decision on ripeness grounds, the majority forecloses any argument that could have been brought on this issue by either party in this case. Therefore, and with all due respect, in my view it may also be said that the ripeness issue that the majority addresses is likewise unripe because none of the parties have argued it before this court.

For these reasons, I respectfully dissent.

Akama C. Takayama